



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS NO. 488 & 489 OF 2013

EPHRAIM BEN GITAHU.....1ST APPELLANT

MARTIN NGECHU KUNG'U.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment by J. Wekesa, Ag. Senior Resident Magistrate,

in Murang'a Criminal Case No. 29 of 2012 delivered on 14th August 2013.]

JUDGMENT

1. The appellants were convicted on a count of *robbery with violence* contrary to section 296 (2) of the **Penal Code**. They were sentenced to *suffer death*.

2. The particulars of *count 1* were-

“On the 20th day of December 2011 at 07:15 p.m. at Kairo Location in Murang'a County, with others not before the court, while armed with dangerous weapons namely a gun, iron bars and rungu, robbed Hanniel Mutungu Kibue one mobile phone make Nokia 1203 valued at Kshs 2,500 and cash Kshs 15,000 and immediately before and after the time of such robbery wounded the said Hanniel Mutungu Kibue.”

3. The appellants filed separate appeals. The two appeals were consolidated on 29th June 2015. At the hearing of the appeals, the two appellants purported to rely on some documents titled *supplementary grounds of appeal*. No leave was sought from the court under section 350 of the **Criminal Procedure Code**.

4. The original petition of appeal by the 1st appellant raised *eight* grounds. They can be abridged into *six*: Firstly, that the appellant was not positively identified; secondly, that the dangerous or offensive weapons were not produced; thirdly, that it was impractical to use a gun, iron bar and *rungu* simultaneously; fourthly, that the evidence was contradictory and unreliable; fifthly, that his defence was disregarded; and, lastly, that the sentence was too harsh.

5. The 2nd appellant's petition was along the same lines. He however added *three* other *grounds*: that no identification parade was conducted; that the trial court relied on hearsay evidence; and, lastly, that *count 1* was not proved beyond reasonable doubt.

6. At the hearing of the appeal, both appellants relied on their written submissions filed on 25th July 2018. The core of the submissions is that the prosecution failed to *prove* the charge beyond reasonable doubt. The 1st appellant also asked for *review* of the sentence in view of the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic** Petition 15 & 16 of 2015 [2017] eKLR.

7. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved.

8. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. **Njoroge v Republic** [1987] KLR 19, **Okeno v Republic** [1972] EA 32, **Kariuki Karanja v Republic** [1986] KLR 190.

9. On 20th December 2011 at about 7:15 p.m., the complainant (PW1) was at home watching television. A stranger brandishing a gun entered the room and proclaimed in *Kikuyu*: You have visitors. He was followed by another stranger wielding a gun and a *panga*. The two attacked him and cut him on the head. The first assailant hit him with the gun. They were then joined by a third thug. The complainant tried to struggle with them but he was overpowered.

10. The assailants continued to attack him. They then took his phone, some money from his pocket and Kshs 7,000 from his wallet. They tied a seat cushion to his head and forced him to lie on a sofa face down.

11. He said the first person (1st appellant) had a cap that did not cover his eyes. The lights were on. He said he identified him by his walking style. He said he identified the 2nd appellant as he had recently left employment at the complainant's home. He said that although he saw him he (PW1) feigned ignorance. He said he did not want to mention his name "as [he] would have reacted severely."

12. PW1 did not recognize the third assailant. The assailants then proceeded to attack his son.

13. His son (PW4) was washing dishes in the kitchen. A man wielding a *panga* approached him from behind and dragged him to the sitting room. He saw his father was bleeding. The thug placed him on top of his father and left the house. His mother (PW2) came in. The thugs chased her outside. The thugs returned with two workers. One of the workers, Mathenge, was bleeding from the mouth. They were forced to lie down.

14. PW4 switched on the alarm. Some neighbours responded. PW4 rushed his father and the two workers to Gichiche Dispensary. They were referred to Othaya Hospital. PW1 was eventually admitted at Outspan Hospital, Nyeri. PW4 was only able to recognize one of the attackers. He said he was his classmate. He did not name him; and, he was not one of the appellants.

15. PW2 and some workers were in the servant quarters preparing some maize for dinner. She heard some commotion at the parking lot. She told her worker, Alice, to check. PW2 said she saw someone lurking in the shadows.

16. The assailants then entered the servant quarters and started beating them. They screamed. One of the attackers cut Alice on the head. PW2 ran out to the main house. She encountered one of the thugs. He had a pistol. He chased her out. She ran towards the *shamba*. She did not identify any of the attackers.

17. PW3 was Dr. William Kibe of Outspan Hospital. He said PW1 had bloodstained clothes. He had bled a lot. He had wounds at the back and side of the head. His ear lobe was cut. He had a stab wound on the side on the neck. He had another stab wound on the thigh. He produced the P3 Form (exhibit 1)

18. He also examined one of PW1's workers, Alice Murage. She had deep cuts on the tendons of the 3rd, 4th and 5th fingers. She had fractures on the 4th metacarpal bone. He said the injuries were caused by a sharp object. He produced her P3 form as exhibit 2.

19. PW5 was Police Corporal Muroki. The report of the robbery was made the same night at about 9:00 p.m. He visited the scene the following day. On 8th January 2012, he arrested the 2nd appellant at Kiria-Ini town. On 3rd March 2012, he and another officer arrested the 1st appellant.

20. I have then considered the substance of the defence put forth by the appellants. The 2nd appellant (1st accused in the lower court) denied committing the offence. He said he was arrested at Kiria-Ini on 8th January 2012. He was at home with his wife. He admitted that he used to work for PW1 but had left employment. He said he had saved sufficient money to start a *boda boda* business.

21. The 1st appellant (2nd accused in the lower court) said he was not at the *locus in quo*. He claimed that on the material night, he had dinner with his wife at 8:00 p.m. He retired to bed after the 9:00 p.m. news bulletin. That fact was confirmed by his wife. The 1st appellant said he was arrested two months after the incident.

22. A number of matters arise from that evidence. The first relates to *identification*. In **Kiarie v Republic** [1984] KLR 739, the Court of Appeal held-

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

23. In **Maitanyi v Republic** [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

"It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, State counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"

24. When I juxtapose those authorities against the evidence, I find as follows. The appellants spent a *considerable* amount of time in the house of the complainant. There were about five assailants. The incident took place at night. But there was electric light in the sitting room. PW1 clearly identified the 1st appellant who used to be his worker. He also identified the 2nd appellant whose cap did not fully cover his face. Neither PW1 nor the other witnesses identified the other attackers.

25. The next key question is whether *all* the ingredients of the offence of *robbery with violence* were established. Section 296 (2) of the Penal Code provides-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.

26. There were more than two thugs. They were armed with dangerous or offensive weapons including guns, iron bars and *pangas*. True, the weapons were not produced in court but they were sufficiently identified by PW1, PW2 and PW4.

27. The appellants and their accomplices stole money, a cellphone and other household items. They savagely attacked PW1, PW4 and another worker, Alice. The injuries were corroborated by Dr. Kibe (PW3).

28. In our criminal justice system, the *legal burden* of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

29. The evidence of PW1, PW3 and PW4 was consistent and reliable in the material parts. There was concrete evidence of identification; and, that both appellants and their accomplices robbed the complainant of the cash and mobile phone.

30. When juxtaposed against the clear evidence of the prosecution, the defences by the appellants were a complete sham. They largely dwelt on their arrest. Both appellants were placed at the scene of the robbery. On re-appraisal of all the evidence, the defences are *unbelievable*.

31. I am *satisfied* from the entire corpus of that evidence that *all* the material elements of the offence of *robbery with violence* were present; and, that all the ingredients were *proved* beyond reasonable doubt.

32. I will now to turn to the sentence of death. Until recently, the offence attracted the mandatory sentence of death. But the Supreme Court in **Francis Karioko Muruatetu & another v Republic** Petition 15 & 16 of 2015 [2017] eKLR held as follows-

“The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”

33. The death sentence has *not* been outlawed; but it is no longer mandatory. This is a first appeal. I am at liberty to *review* the sentence. The two appellants were first offenders. The 1st appellant told the trial court that his wife and children looked up to him for support. The 2nd appellant said he had a chest problem. He prayed for leniency.

34. I have considered those matters. The sentence imposed on an offender must be *commensurate* to his moral blameworthiness. **Macharia v Republic** [2003] 2 E.A 559. The appellants were armed with guns, metal bars and *pangas*. The orgy of violence against the complainant’s family and his workers resulted in serious and permanent injuries.

35. In this case, justice can only be served by a lengthy prison term. I will sentence the appellants to serve *life imprisonment*.

36. The upshot is that the appeal on conviction is *dismissed*. The sentence of death is *set aside*. I sentence the appellants to serve *life imprisonment*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 27th day of March 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

1st and 2nd appellants.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.